

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES EDWARD REIMERS,

Defendant and Appellant.

C070932

(Super. Ct. No.
CRF11311)

Defendant Charles Edward Reimers pled no contest to corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a).) In accordance with the plea agreement, the trial court (O'Connor, J.) placed defendant on a three-year term of probation and issued a protective order severely restricting defendant's contact with the victim.

Defendant subsequently admitted to violating his probation. The trial court (Scrogin, J.) declined to reinstate probation and sentenced defendant to the upper term of four years in state prison.

On appeal, defendant contends the trial court abused its discretion in sentencing him to the upper term. We disagree and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Offense Conduct

On May 28, 2011, Kathleen S. visited defendant at a Marysville Motel 6. They fell asleep together after defendant drank alcohol. The next morning, defendant began packing to go to Kathleen S.'s house with her. When she tried to tell defendant she did not want him at her home, he became enraged and pushed her into a wall and then out of the room.

Outside, defendant pushed Kathleen S. as she tried to get into her car, causing her head to hit the driver's side door frame. He then slammed the door on Kathleen's right leg, causing her minor injuries.

Defendant had suffered 10 prior misdemeanor convictions and a prior conviction for first degree burglary. He had violated prior grants of probation or parole numerous times.

Plea and Sentencing

On July 25, 2011, defendant entered a plea to corporal injury to a cohabitant, conditioned on the People's offer of no state prison. On August 22, 2011, the parties appeared for sentencing and the trial court announced that the probation report recommended rejecting the plea agreement, as defendant was not suitable for probation. The probation report identified defendant's prior convictions, his prior prison term, and poor

performance on probation as aggravating factors, and found no mitigating factors.

The trial court indicated it would disregard the recommendation contained in the report and sentence in accordance with the plea agreement, primarily because of Kathleen S.'s request that defendant not be sent to prison, and also because defendant had expressed a "willingness to comply with the terms of probation." When the trial court accepted the plea but continued defendant's sentencing to permit probation time to prepare "conditions that they think would most help [defendant]," defendant objected to his continued detention, claiming, "I've been through this before . . . So I'm very familiar with Probation and all their requirements. So I know exactly what I need to do."

On September 12, 2011, the trial court sentenced defendant to three years of probation, served him with the protective order, and ordered him to report to probation by 11:00 a.m. on September 14.

Probation Revocation

At his probation revocation hearing held on March 19, 2012, defendant admitted failing to report to probation as directed in September 2011 and violating the protective order two days after his sentencing. On April 17, 2012, the trial court declined to reinstate defendant's probation and imposed the upper term of four years in state prison. In so doing, the trial court announced: "I'm considering the seven violations of parole in this matter. I'm considering that this is an upper-term case

because [defendant] has a consistent history of criminal conduct. He has prior convictions as an adult that are numerous and of increasing seriousness at this point in time. There are no factors in mitigation. He has served a prior prison term. His performance on probation and parole have both been unsatisfactory, two violations of probation, seven violations of parole."

DISCUSSION

Defendant contends the trial court (Scrogin, J.) abused its discretion both by ignoring mitigating circumstances (found by O'Connor, J. when she granted probation), and relying on circumstances arising *after* the grant of probation to impose the upper term. (See California Rules of Court, rule 4.435(b).¹) As we explain, we are not persuaded.

¹ Further undesignated references to rules are to the California Rules of Court.

Rule 4.435(b) states in relevant part: "(b) On revocation and termination of probation under [Penal Code] section 1203.2, when the sentencing judge determines that the defendant will be committed to prison: [¶] (1) If the imposition of sentence was previously suspended, the judge must impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 4.433(c). [¶] The length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found."

I

Mitigating Circumstances

Defendant's first contention is based on *People v. Goldberg* (1983) 148 Cal.App.3d 1160 (*Goldberg*). The trial court in *Goldberg* found mitigating circumstances when granting probation, but did not refer to them when it later revoked probation and imposed the upper term. (*Goldberg, supra*, 148 Cal.App.3d at p. 1162.) The court of appeal held that the requirement to consider findings of the original sentencing court when revoking probation and imposing sentence applies even when those findings were not mandatory. (*Goldberg, supra*, at p. 1162.) Here, defendant claims the second trial court's finding that there were no mitigating factors did not conform to the requirements of *Goldberg* because it ignored the first trial court's findings of factors in mitigation.

While the relevant rules of court have not materially changed since *Goldberg*, sentencing law has. When *Goldberg* was decided, the choice of prison term was driven by aggravating and mitigating circumstances; the middle term was presumptively correct, and a sentencing court could impose an upper or lower term only after weighing the aggravating and mitigating circumstances. (Former rule 439(b); *Goldberg, supra*, 148 Cal.App.3d at p. 1163.) Now, the trial court must state reasons for its sentencing choices, but is no longer required to cite aggravating or mitigating factors or to weigh the same. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846-847; see rule 4.420(b) ["In exercising his or her discretion . . . the

sentencing judge *may* consider circumstances in aggravation or mitigation, *and any other factors* reasonably related to the sentencing decision," italics added].)

Further, a trial court that chooses to suspend imposition of sentence cannot limit another court's discretion to select the appropriate term if probation is revoked. (See *People v. Howard* (1997) 16 Cal.4th 1081, 1084 ["We conclude that if the trial court has suspended *imposition* of sentence, it ultimately may select any available sentencing option"].) While a court must state the reasons for imposing the particular term, it need only state the "primary factor or factors that support the exercise of discretion." (Rule 4.406(a).) A court need not state its reasons for disregarding or minimizing mitigating factors. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

It is defendant's burden to show that the sentencing court did not properly exercise its discretion. (*People v. Tang* (1997) 54 Cal.App.4th 669, 677.) There is no indication in this record that the trial court did *not* consider the findings made at the time probation was granted; we decline to infer the trial court's disregard from a silent record.²

² To the extent that the *Goldberg* court's interpretation of rule 4.435 is contrary to the rule's plain meaning, improperly limits a sentencing court's discretion, and is superseded by changes in the law, we decline to follow it.

II

Considerations Arising After the Grant of Probation

Defendant's final contention is that the trial court violated rule 4.435(b)(1) when selecting the upper term by considering events that occurred after the grant of probation.

At the sentencing hearing, the trial court noted defendant's conduct in violating probation included contacting the victim and failing to report to probation. The court also noted that defendant "lasted two days on probation in this matter." Defendant argues these observations show the trial court improperly imposed the upper term sentence based on his failures on probation. We disagree. Viewing the record in its entirety, it is clear that the trial court properly relied on defendant's violations of his current probation to *deny reinstatement*, not to select the upper term.

When denying reinstatement, the court discussed defendant's failure to "honor the Court's orders" and that defendant "lasted two days on probation in this matter." The court then imposed the upper term based on defendant's "consistent history of criminal conduct," his "prior convictions as an adult that are numerous and of increasing seriousness," the fact that "he has served a prior prison term" and that "his performance on probation and parole have both been unsatisfactory," concluding that "This is an appropriate upper term case[.]" Given the record in this case, these observations and findings do not constitute an abuse of discretion. The trial court did not err.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.